E. Conclusion:

This action is therefore dismissed with costs to the defendant. As for the counterclaim of the defendant I do not think it is necessary for me to rule on it in view of the decision I have arrived at. Anyway I note that learned Counsel for the defendant did not appear to have pursued it judging from her conduct of the defence case. By reason of my views on Issue (b) aforesaid though very briefly, I would have no hesitation to dismiss the counterclaim.

KIMDEN HOUSING DEVELOPMENT SDN. BHD. (IN LIQUIDATION)

v.

ASIA COMMERCIAL FINANCE (M) BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. D2-22-287-1992]
24 MAY 1994

PRACTICE & PROCEDURE: Order 32 r.16 RHC - Consent order - Parties consenting to setting aside of judgment in default - Order drawn up - Order not in terms of consent but in terms of summons in chambers - Parties agreeing to amend under slip rule - Court inviting parties to act under O. 32 r. 16 RHC governed by Practice Direction No. 2 of 1989 - Saving of time and expense - Attendance of parties not required - Service of sealed summons not required.

The plaintiff filed an action against the defendant for damages for breach of a financing agreement and subsequently entered judgment in default of appearance. The defendant applied by summons in chambers to set aside the judgment in default as well as the orders for renewal and amendment of the writ obtained by the plaintiff. At the hearing both parties consented to the judgment being set aside and the defendant accordingly applied for an order in terms of the consent. However, unknown to the parties the learned Senior Assistant Registrar (SAR) made an order in terms of the summons in chambers and not the consent. The draft order was also settled in terms of the summons in chambers and was sealed by the Court and served on the plaintiff's solicitors. The error was eventually raised by the plaintiff's solicitors at a hearing of the defendant's application to strike out the plaintiff's action. Both Counsel agreed to amend the order under the slip rule but was instead invited by the Court to act under O. 32 r. 16 of the Rules of the High Court 1980 (RHC) to save time and costs. A summons in chambers was issued and served on the defendant's solicitors who endorsed their consent on the draft order attached and returned it to the plaintiff's solicitors. Both Counsel appeared before the Judge in chambers on the summons.

Held:

[1] The very purpose of r. 16 had been defeated. Time and expense had not been saved. Rule 16 exists in order to obviate the necessity

of Counsel having to appear on the application in question at chambers. Practice Direction No. 2 of 1989 governs the situation. What the plaintiff's solicitors could have done was serve the unsealed summons on the defendant's solicitors and at such time, by prearranged appointment, procure their written consent on the summons itself or by a separate document attached to the summons and file the same together with an affidavit of service accompanied by a covering letter to the SAR referring the SAR to the provisions of r. 16 and requesting that the matter be referred to the Judge for appropriate action under the rule and complying with paragraph 4 of the Practice Direction. Thus r. 16 would have been applied by one systematic forward movement without the plaintiff's solicitors, after filing the summons, having to backtrack to the registry a second time to obtain the sealed summons then having served the summons, return to the registry a third time to file the affidavit of service of the sealed summons.

[2] Rule 16 as read with r. 1 of O. 32 does not require that a sealed summons be served. Seeing that the essence to the making of an order under r. 16 was consent without which there could be no order, the Court did not see any requirement for a sealed summons to be served. Service of such summons was not envisaged by the Practice Direction.

[Order granted under O. 32 r. 16].

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 20 r. 11, O. 32 rr. 1 & 16, O. 42 rr. 8(2), 9(1) & 10(5)

For the plaintiff-Joseph Loo Shin Mun;M/s. Shinmun Associates
For the defendant-John Clark Sumugod;M/s. Sidek Teoh Wong & Dennis

JUDGMENT

Richard Talalla J:
On 21 February 1992 the plaintiff filed a writ of summons and statement of claim against the defendant claiming, *inter alia*, general damages in respect of the defendant's alleged breach of a financing agreement. No appearance having been entered, the plaintiff caused judgment in default of appearance to be entered. Prior thereto the plaintiff had applied for and obtained an order for the renewal of the writ of summons and also an order for leave to amend the writ of summons and statement of claim.

The defendant then applied by summons in chambers returnable before the Senior Assistant Registrar (the SAR) for an order that the judgment in default be set aside as well as the orders for the renewal and the amendment. At the hearing Counsel for both parties consented to an order that the judgment be set aside and accordingly Counsel for the defendant applied for an order in terms of the consent in the presence of plaintiff's Counsel who confirmed the same.

Unfortunately, the learned SAR made an order not in terms of the consent but in terms of the summons in chambers. That fact was not known to either Counsel at the time. Both the Counsel withdrew from the chambers of the SAR bearing the knowledge that an order had been made in terms of the consent.

The defendant having the carriage of the order, its solicitors settled a draft order and sent it on to the plaintiff's solicitors for approval. Pursuant to the provisions of O. 42 r. 8 of the Rules of the High Court 1980 (the rules) the plaintiff's solicitors were required within two days of the receipt thereof or within such further time as may have been allowed by the SAR to return the draft with their signed consent or any required amendments thereto. The plaintiff's solicitors omitted to do so and accordingly, pursuant to sub-rule (2) of r. 8 aforesaid, they were deemed to have consented to the terms thereof. The defendant's solicitors thereafter submitted the draft to the SAR for settlement pursuant to sub-rule 4 of the said rule. The learned SAR settled the draft in terms of the summons in chambers and sent it back to the defendant's solicitors who, pursuant to r. 9(1) of the order aforesaid, had the order drawn up in terms of the draft as settled by the SAR and, pursuant to r. 10(5) of the said order, it was passed by the proper officer, sealed with the seal of our Court and returned to the defendant's solicitors who served a copy of the same on the plaintiff's solicitors. Meanwhile the defendant's solicitors without reference to the order applied by summons in chambers returnable before a Judge for an order that the action be struckout pursuant to the provisions of O. 18 r. 19. That summons came on for hearing before me when Counsel for the plaintiff appeared and submitted that the sealed order was bad and therefore the summons should be dismissed. The view I took was that as long as the order remained extant I would have to have regard to it. Counsel for the defendant,

having conceded that the order not being in terms of the consent was bad and both Counsel having agreed that it should be amended under the slip rule, namely O. 20 r. 11 of the rules, the Court drew Counsels' attention to the provisions of O. 32 r. 16 and invited the parties to act thereunder with a view to saving time and costs. The said r. 16 reads:

> If the Judge is satisfied that all parties to an application at chambers have been served and have consented to the application he may in the absence of the parties or their solicitors order the granting of the application by minute on the file and the Court shall inform the applicant or his solicitors in writing of the order.

Thereafter the plaintiff's solicitors settled an application at chambers and attached thereto a form of order in terms of the consent and filed the same with the registry. The application which was in the form of a summons in chambers as required by O. 32 r. 1 was issued and returned before me. The plaintiff's solicitors had served a duplicate of the summons on the defendant's solicitors together with a draft order attached thereto. Upon such service, the defendant's solicitors endorsed their consent on the draft and returned it to the plaintiff's solicitors. This morning both Counsel appeared before me in chambers on the summons. It seems to me that the very purpose of the provisions of r. 16 aforesaid has been defeated. Time and expense have not been saved. As I understand it, r. 16 exists in order to obviate the necessity of Counsel having to appear on the application in question at chambers. Practice Direction No.2 of 1989 governs the situation. For easy reference it is set out hereunder:

Practice Direction No.2 of 1989
Re : Consent Order under Order 32 rule 16 of the Rules of the High Court 1980

1. Under the above provision of the rules a Judge if satisfied that all parties to an application in chambers have been served and have consented to the application may in the absence of the parties or their solicitors order the granting of the application by minute on the file in which case the Court shall inform the applicant or his solicitor in writing of the order.
2. The Hon'ble the Chief Justice of Malaya is concerned that the definite saving of time and expense that the exercise of the powers under the above provision offers has not generally been appreciated and taken advantage of by practitioners and Judges with the result that much time is wasted by the parties or their solicitors attending in uncontested chamber applications.
3. The Hon'ble the Chief Justice of Malaya has accordingly directed that henceforth, with the view to saving time and costs but subject to the requirements hereinafter mentioned, a party may apply to the registry of the High Court by post for a consent order to be made by the Judge and for such order to be drawn up.
4. The letter of application shall be accompanied by:
   (a) the summons setting out fully and with sufficient precision the terms agreed upon by the parties concerned;
   (b) the written consent of the parties concerned or their solicitors; the same to be signed and dated and expressly stating that each party consents to the terms agreed as set out in the summons;
   (c) if it is also desired that the consent order should be drawn up and extracted, an engrossed copy of the proposed order in duplicate stating fully and with sufficient precision the terms of the agreed order.
5. If the requisite documents are in proper form and order, the Senior Assistant Registrar shall place the proposed consent order before the Judge for his consideration, who if he thinks fit will make the order accordingly.
6. If the Judge makes the consent order, the Senior Assistant Registrar shall, as soon as may be practicable take necessary action for the order to be duly passed and drawn up. Upon extraction of the order, the Senior Assistant Registrar will return the duplicate copy thereof by post to the party making the application but will retain the original order made by the Judge for filing.

I will go further. What the plaintiff's solicitors could have done was to serve the unsealed summons on the defendant's solicitors and at the time of such service, by prearranged appointment, procure their written consent to the order sought therein by an endorsement of their consent on the summons itself or by a separate document attached to the summons and file the same together with an affidavit of service of the same on the defendant's solicitors accompanied by a covering letter referring the SAR to the provisions of r. 16 and requesting the SAR to refer the matter to the Judge for appropriate action under that rule and complying in all respects with paragraph 4 of the said Practice Direction. Thus the provisions of r. 16 would

have been applied by one systematic forward movement without the plaintiff's solicitors having filed the summons to backtrack to the registry a second time to obtain the sealed summons then having served the sealed summons return to the registry a third time to file an affidavit of service of the sealed summons.

Some reservation was expressed as to the propriety of serving an unsealed copy of a summons on the defendant. Rule 16 as read with r. 1 of O. 32 does not require that a sealed summons be served. Seeing that the essence to the making of an order under r. 16 is consent without which there can be no order, I do not see any requirement for a sealed summons to be served. Certainly service of such a summons is not envisaged by the Practice Direction abovestated.

I would now make the order under r. 16.

MARIAM BINTI SHAIK MOHD OMAR

v.

ONG CHIN POH

HIGH COURT MALAYA, PENANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J.
[CIVIL APPEAL NO. 11-73-91]
27 JULY 1994

PRACTICE & PROCEDURE: Application to strike out claim - Defence of limitation - Whether claim could be struck out on the basis that the defendant had a good limitation defence - Whether defence of limitation sufficiently pleaded - Subordinate Courts Rules 1980 O. 14 r. 21 - Rules of the High Court 1980 O. 18 r. 19.

The plaintiff commenced action against the defendant in 1987 claiming for damages which the plaintiff alleged the defendant had caused her by causing damage to her property and dwelling house when the defendant undertook the construction of a three storey house in the neighbouring property. The plaintiff further claimed for damages for inconvenience and mental anguish but did not plead nuisance. Apparently the construction work in question had been completed by the defendant in 1977 and hence the defendant, by paragraph 9 of his defence, claimed that the action was barred by statute. The defendant did not however mention the Limitation Act by name.

In August 1988 the defendant filed a notice of application to strike out the plaintiff's summons and statement of claim under O. 14 r. 21 of the Subordinate Courts Rules 1980. The Sessions Judge allowed the application on the ground that the action was statute-barred. The plaintiff appealed and the main issue that arose was whether in applying to strike out the plaintiff's claim herein, it was open for the defendant to rely on the defence of limitation pleaded in the main defence to the claim.

Held:

[1] As to whether a defendant could apply to strike out a claim under O. 14 r. 21 SCR (in *pari materia* with O. 18 r. 19 RHC) on the basis of a good limitation defence, this Court is bound to follow the Federal Court decisions in *Tio Chee Hing & Ors. v. Government of Sabah* and *Haji Husin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors.* Although these two decisions were decisions in respect of the Public Authorities